

Uniform Guidance Update

On August 13, 2020, the Office of Management and Budget (OMB) issued its Final Guidance on amendments to the OMB Guidance for Grants and Agreements (Uniform Guidance). The revisions incorporate current goals and initiatives of the current administration, statutory requirements, and clarifications of existing requirements. For the most part, these revisions grant agencies flexibility in designing and monitoring programs and encourage the use of data collection and reliance on data to identify best practices.

This update represents the federal government's first five-year update of the critical and still relatively new government-wide Uniform Guidance and there are a number of noteworthy changes. Below is information on these changes, key takeaways and effective dates.

Noteworthy Changes:

- **Performance-Based Focus in Award and Evaluation:** Language has been amended throughout the guidance to emphasize agency focus on substantive program accomplishment and consideration of data relating to programmatic effectiveness. While these changes do not appear likely to alter performance risk, it is possible that emphasized data in funding opportunity announcements and required reports may shift slightly as a result.

The shifting emphasis to performance and results is not inherently bad. Be aware that the compliance burdens associated with this changing emphasis will increase, as will the risk of losing the project funding if you do not achieve the intended outcomes OR the awarding agency concludes results are unsatisfactory despite best efforts.

- **Implementing Language for Executive Orders 13891 and 13892 on Guidance Documents:** Though not directly referencing E.O.s 13891 and 13892 (Oct. 9, 2019), a new subsection (b) has been added to 2 C.F.R. § 200.105 (Effect on other issuances) to operationalize, for grant programs, the E.O.s' limitations on "binding" sub-regulatory guidance.

Under the new § 200.105(b) language, it appears that sub-regulatory guidance may still be incorporated into awards, but only if (i) clearly referenced in the award document, and (ii) properly promulgated and published in accordance with the requirements of E.O. 13891. For most guidance, this means it will have to be publicly accessible on a searchable agency database at the time of award and referenced in some way in the

award document. Guidance which “materially alter[s]” a grant recipient’s rights and obligations would be considered a “significant guidance document” required to go through a notice and comment process.

- **Termination Standards:** The bases available for termination of an award have been expanded to include authorization for awarding agencies to terminate an award “to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities.” The termination language has also been modified to strongly encourage agencies to clearly articulate termination rights and procedures “in applicable agency regulations or in the award [document].” See Revised § 200.340 (formerly § 200.339).
- **Budget Period Concept:** Various textual changes have been made to (i) clarify the concept of funded “budget periods,” and (ii) emphasize the fact that future budget periods are not guaranteed even if referenced as potential future award periods in a notice of award.
- ***De Minimis* Rate Availability Broadened and “No Documentation” Standard Clarified:** Revisions to 2 C.F.R. § 200.414(f) expand the availability of the *de minimis* rate to all entities that do not currently have a negotiated indirect cost rate agreement (NICRA). Additionally, while continuing to caution that directly charged costs must not be recovered twice by application of the *de minimis* rate, the changes emphasize that, as a matter of grant administration, “[n]o documentation is required to justify the 10% *de minimis* indirect cost rate.”
- **Subaward Matters:** While continuing to state that pass through entities must recognize federally approved NICRAs, 2 C.F.R. § 200.332 (formerly § 200.331) is amended to clarify that in the absence of a federally approved NICRA, pass through entities are to either negotiate a rate, adopt a rate negotiated by the subrecipient previously with the pass through entity or another pass through entity, apply the *de minimis* rate, or accept a direct allocation methodology employed by the subrecipient.

The revised guidance further clarifies that pass through entities are only responsible for addressing findings in Single Audit Act audit reports related to their particular subawards, only specifically related to its award. In other word, pass-through entities are not responsible for addressing a subrecipient's entire audit findings; the cognizant agency is responsible for addressing a subrecipient's entity-wide issues.

- **Procurement Matters Generally:** Section 200.320 was redrafted to enhance its clarity. The revised language is clearer with respect to methods of procurement and their relationships to each other, as well as in clarifying that micro-purchases require no competitive process. The revisions also adopt the increased micro-purchase threshold (MPT) of \$10,000 and simplified acquisition threshold (SAT) of up to \$250,000. Further,

and unexpectedly, the revisions authorize grantees with clean audits (or certain other qualifications) to annually elect MPTs of up to \$50,000. With approval of a grantee's cognizant agency for indirect costs, MPTs may also, at least theoretically, be raised above \$50,000. Finally, a new § 200.322 was added (as proposed in January) to suggest that grantees "should" provide for domestic sourcing preferences "to the greatest extent practicable."

- **Section 889 of the 2019 NDAA (the "Huawei Ban"):** Though considerably scaled back from the January 2020 proposed rule, a new § 200.216 provides for a broad prohibition against purchasing any "equipment, services, or systems that uses [sic] covered telecommunications equipment or services as a substantial . . . component of any system." Covered telecommunications equipment or services include such items provided by Huawei Technology Company, ZTE Corporation, or any of their many subsidiaries or affiliates. When it is to be used for certain public security purposes, such equipment also includes products provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company, and their subsidiaries and affiliates. Additional information on this new requirement will be forthcoming through an alert dedicated to this matter. A newly selected item of cost has also been added to implement this requirement at § 200.471.
- **Never Contract with the Enemy:** To implement Sections 841-843 of Public Law 113-291, the National Defense Authorization Act ("NDAA") for Fiscal Year 2015, OMB added 2 C.F.R. Part 183 and 2 C.F.R. § 200.215 – Never Contract with the Enemy, applicable to grants and cooperative agreements in excess of \$50,000, that are performed outside the United States and its territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. These provisions prohibit recipients from providing funds, subawards, or contracts to persons actively opposing the United States or coalition forces involved in said contingency operations.
- **Other Notable Changes:**
 - The definitions have been consolidated into a single section at 2 C.F.R. § 200.1;
 - Guidance has been added regarding the repayment of funds via an electronic letter of credit systems such as HHS's Payment Management System "PMS") (2 C.F.R. § 200.305(b)(10));
 - Pre-award costs are, when authorized, generally to be charged only to the first budget period of an award (§ 200.458);
 - Publication costs related to research, when authorized, are generally to be charged only to the final budget period of an award (§ 200.461); and

- The period available to direct recipients to submit final reports during closeout has been extended to 120 days, while the period for subrecipients to do so remains, absent special circumstances, 90 days (§ 200.344(a)).
- OMB now requires, if applicable, that financial assistance applicants provide certain information on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract, grant, or cooperative agreement within the last three years (§ 25.200).

Key Takeaways

- While the Final Guidance does not include an express requirement for recipients to flow down § 200.216 to sub-recipients, the Final Guidance applies the prohibition to both "recipients and sub-recipients." Therefore, in order to ensure that sub-recipients are complying, it would be prudent for recipients to include § 200.216 in their sub-recipient agreements.
- A similar approach should be considered with subcontractors. Again, there is no required flow down, but if recipients and sub-recipients are ensuring that federal funds are not being expended on covered telecommunications equipment or services, it would be prudent for recipients and sub-recipients to include a representation or certification in subcontracts that funds expended under such are not being used to acquire covered telecommunications equipment or services for use.
- Unlike the procurement regulations set forth in the FAR, there is no requirement in the Final Guidance for awardees to make an affirmative certification regarding the procurement or obtaining of covered telecommunications equipment or services using loan or grant funds.
- The Final Guidance does not include a "non-use" provision similar to the "Part B" prohibition that applies to federal contractors. Rather, recipients cannot obligate or expend funds to "procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system." This does not prohibit recipients from using covered telecommunications equipment or services; rather, they simply cannot use federal loan or grant funds to acquire such equipment or services. Grant recipients should still be aware of what they are including in their indirect costs, however, as prohibited equipment should be excluded from an allowable cost pool.

- Federal agencies may issue their own individual guidance on complying with the Section 889 prohibitions and the new requirements set forth in the Uniform Guidance. Recipients should monitor the individual agencies that they receive grant funds from in order to ensure that they are complying with any newly-issued, agency-specific requirements.

Effective Date

The effective date of the Uniform Guidance revisions is November 12, 2020, with some exceptions and caveats:

- The effective date of regulations implementing the Section 889 (the “Huawei Ban” discussed below) are effective immediately, *i.e.*, August 13, 2020, the issuance date of the Final Guidance.
- The revisions are not applicable to awards of federal financial assistance issued prior to August 13, 2020, including funding under the awards under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 (Pub. L. 116–136).
- To the extent that the revisions may impact negotiated indirect cost rate agreements (NICRAs) (or underlying costs), they will only go into effect for future NICRAs (any NICRAs in effect as of August 13, 2020, will remain valid until their expiration).
- Since the Department of Health and Human Services (HHS), has implemented the Uniform Guidance in 45 C.F.R. Part 75 through entirely separate text, the revisions will not technically be effective for HHS awards until HHS implements them. Additionally, to the extent exceptions adopted in other agency-specific regulations might now be impacted by specific updates from these government-wide Uniform Guidance revisions, further clarifying action by those agencies may be necessary.

Conclusion

Organizations that are subject to the Uniform Guidance need to be aware of how they are using grant or loan funds, and what types of equipment and services they are procuring with those funds, to ensure compliance with Section 889 and 2 C.F.R. § 200.216

<https://www.lexology.com/library/detail.aspx?g=dcd243a3-20be-434b-ac50-0726b295e8d9>

<https://www.venable.com/insights/publications/2020/09/revisions-to-the-uniform-guidance-include-wel>

<https://www.feldesmantucker.com/august-2020-uniform-guidance-changes-key-takeaways-from-the-five-year-update/>